Supreme Court, U. S.
FILED
NOV 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1575

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MIDWEST VIDEO CORP., *et al.*,
Respondents.

No. 77-1648

AMERICAN CIVIL LIBERTIES UNION,
Petitioner,

v.

MIDWEST VIDEO CORP., *et al.*,
Respondents.

No. 77-1662

NATIONAL BLACK MEDIA COALITION,
CITIZENS FOR CABLE AWARENESS IN PENNSYLVANIA AND
PHILADELPHIA COMMUNITY CABLE COALITION,
Petitioners,

v.

MIDWEST VIDEO CORP., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF THE MOTION PICTURE ASSOCIATION OF AMERICA

BARBARA SCOTT
JAMES BOURAS
FRITZ E. ATTAWAY
1600 Eye Street, N.W.
Washington, D.C. 20006
Attorneys for Amicus Motion Picture Association of America

Of Counsel:
ARTHUR SCHEINER
STUART F. FELDSTEIN
WILNER & SCHEINER
2021 L Street, N.W.
Washington, D.C. 20036

INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1575

Federal Communications Commission,
Petitioner,

v.

Midwest Video Corp., *et al.*,
Respondents.

No. 77-1648

American Civil Liberties Union,
Petitioner,

v.

Midwest Video Corp., *et al.*,
Respondents.

No. 77-1662

National Black Media Coalition,
Citizens for Cable Awareness in Pennsylvania and
Philadelphia Community Cable Coalition,
Petitioners,

v.

Midwest Video Corp., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF THE MOTION PICTURE ASSOCIATION OF AMERICA

Motion Picture Association of America, Inc. and Columbia Pictures Industries, Inc., MCA Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation and Walt Disney Productions (hereinafter collectively referred to as "MPAA") hereby submit their brief *amicus curiae* pursuant to Rule 42 of the Rules of the Supreme Court. MPAA's brief is in support of the position taken by petitioner Federal Communications Commission. Written consent to the filing of this brief has been obtained from all parties and has been submitted contemporaneously.

INTEREST OF AMICUS

MPAA is a group of companies who are actively engaged in the production or distribution, or both, of programs for network television and syndication to local television stations, theatrical motion pictures and motion pictures and other programs for cable television. They represent a major segment of the creative forces in the television, motion picture and cable television industries. The rules struck down by the court below, insofar as they mandate the availability of channel space on cable television systems for commercial lease, are of vital importance to the above-listed MPAA members because of the role they play in opening a new marketplace for program product. Affirmance of the decision of the court below will adversely affect these MPAA members' ability to expand and develop this marketplace.

PRELIMINARY STATEMENT

The member companies of MPAA are actively engaged in the distribution of motion pictures to cable television systems. Films licensed to cable televison operators are of-

fered to viewers on a separate "pay" channel.[1] Unlike motion pictures broadcast by conventional television broadcast stations, these films are generally offered to subscribers uncut, unedited and uninterrupted by commercial advertising messages.

At present, virtually all cable system operators which offer pay programming provide only one channel of "pay" programming to their subscribers. If cable system operators are permitted to determine whether the "pay" channel is offered, and if so, to control this channel free from regulatory restraint, there would be no competition in the market for the exhibition of movies to cable subscribers. Thus, cable operators, with their natural geographic monopoly, would have the unfettered ability to deny viewers a choice and to restrict the quantity and quality of programming reaching viewers in their community.

The rules adopted by the Commission and here under review prevent such monopolistic and anti-competitive control of a new communications medium by cable system operators. These rules require, *inter alia*, that cable systems with more than 3,500 subscribers have a minimum capacity of 20 channels, 46 CFR §76.252(a), and that such systems provide leased accessed channels on a non-discriminatory basis, 47 CFR§76.256(d)(3).[2]

By invalidating these rules, the decision of the court below eliminates competition, restricts the programming choices

---

[1] Regular cable service generally consists of the retransmission of several television broadcast signals and some other services such as time and weather channels, public access, and perhaps local origination, all for a set monthly fee. "Pay" cable is an extra channel of originated programming offered to existing subscribers to the regular service for an added monthly fee.

[2] These rules were adopted by the Commission in its *Report and Order in Docket No. 20508*, 59 FCC2d 294 (1976). This decision amended and modified the original rules which had been adopted in 1972. See *Cable Television Report and Order*, 36 FCC2d 143 (1972).

available to cable viewers and proffers an open and continuing invitation to anti-competitive conduct by the operators of cable systems. Without access, no program supplier can be guaranteed a reasonable opportunity to offer his products in the marketplace. Such a result frustrates the promise of cable television which, with its abundance of channel capacity, is ideally suited to providing diverse programming to both mass and specialized audiences.

ARGUMENT

A. Retention of the Commission's Access and Channel Capacity Rules is Vital to Insuring Competition and Program Diversity on Cable Television.

The cable television industry today has expanded far beyond its original function as a community master antenna system in areas where off-air television reception was poor and limited to one or two local stations.[3] Satellites, earth stations and greater channel capacity have all contributed to a growing demand for originated programming and other services, in addition to the retransmission of broadcast signals. Cable television thus presents enormous potential for the creation and dissemination of vast new quantities of diverse programming. But because of the natural monopoly nature of cable systems, a regulatory scheme mandating reasonable access for all program suppliers is vital to the realization of this goal.

[3] In 1968, when this Court decided *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), there were some 2,000 operating cable systems serving 2,800,000 subscribers. As of the beginning of 1978, there were an estimated 4,000 cable systems serving in excess of 13,000,000 television homes according to the 1978 *Television Factbook*. Thus over 17% of the nation's television homes are now served by cable television.

The statutory mandate of diverse programming and a competitive marketplace is clear. Fulfillment of that mandate via cable television turns on the utilization of cable's unlimited channel capacity. Broadcast television is limited by the scarcity of spectrum space and by the dominance of the three national networks. Thus the further expansion of the quantity and variety of program offerings to the public was largely at an end until the advent of cable television's program origination capability. Cable, with its potential for unlimited channel capacity, and thus multiple originated programs, creates a new and exciting opportunity for original programming to serve diverse needs and interests.[4] Program producers, large and small, national and local, could have a totally new outlet to the public.

But this scenario cannot be enacted unless certain regulatory conditions are met, and they will not be met if the decision of the court below is allowed to stand. Cable television is undeniably an integral part of the national telecommunications scheme. Cable systems are natural geographical monopolies. There is only one system per community. Without required nondiscriminatory access cable operators possess virtually unlimited anticompetitive powers. They would be empowered to exercise total control over all originated programming on every channel on their systems. The goals of program diversity and competition cannot be achieved under such a scheme. These goals can only be realized by a guarantee of reasonable access to cable channels for the producers of programming. Access means that programmers, and cable operators, can originate programming on

[4] The birth of "pay" cable is generally recognized to have been in 1972. In 1973, ten cable systems provided a pay service to some 16,000 subscribers. From this base several pay cable services have grown to serve about 2,400,000 subscribers on 789 cable systems as of June 30, 1978, according to *The Pay TV Newsletter* of October 5, 1978. The take-off growth spurt in this service can be marked from mid-1975 when the Commission first began authorizing statellite receiving stations to cable systems. According to Commission data there are now some 600 such stations authorized and this figure is increasing at a rate of about 25 per week.

cable systems, and that subscribers can receive this programming. Otherwise, cable television will become a medium where only the cable operator chooses what his subscribers could see. "Television of abundance" would be an unfulfilled dream and the promise of diversity and competition would not be realized.

Present day marketplace conditions support the scenario described above. Cable operators determine whether or not originated programs will be presented. Where the decision is affirmative today, virtually all cable operators offer only one "pay" channel to their subscribers. By controlling access to this one "pay" channel, they set the terms and conditions on which pay programming may be made available in their communities. A program supplier has no choice. He must either meet the cable operator's terms and conditions or lose the opportunity to have his programming distributed in the marketplace. A cable operator may have no incentive to offer a first originated channel, much less a second or third channel of "pay" programming to his subscribers since such multiple channels would divert audience and diminish the economic potential of the original "pay" channel controlled by the cable operator.

The Commission rules under review are clearly reasonable and appropriate measures properly designed to preclude monopoly control of cable channels by the possessor of that natural monopoly, the cable operator. The lower court's holding should be reversed.[5]

The importance of the Commission's rules in this area will grow markedly as more new services begin to compete in the marketplace. The interests of the providers of new services

[5]Absent preemptive federal regulation, burdensome local regulation is also sure to arise. For example, in the past there have been local efforts to prohibit pay cable. In addition to its effect on program diversity, this points up the need for national uniformity.

will not always coincide with those of cable system operators, nor with each other. The order, uniformity and marketplace access aspects of the Commission rules under review are therefore clearly necessary to insure continued orderly growth.

B. The Commission's Rules are Well Within its Statutory Authority and Serve the Highest Objectives of the Communications Act.

Not only are the rules necessary for the practical reasons outlined above, they are entirely consistent with the regulatory goals the Commission is charged with carrying out under the Communications Act of 1934, as amended. 47 U.S.C. §151-609. Section 2(a) of the Act, 47 U.S.C. §152(a), empowers the Commission to regulate "all interstate and foreign communication by wire or radio." and Section 4(i), 47 U.S.C. §154(i), enables it to "make such rules and regulations, not inconsistent with this Act, as may be necessary in the execution of its functions." The Commission is directed by Section 303(g), 47 U.S.C. §303(g), to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."[6] In short, the Commission is given broad powers to regulate those entities which constitute a part of the national telecommunications scheme.

In *U.S. v. Southwestern Cable, supra*, this Court held that cable systems engage in "interstate communication by wire or radio" within the meaning of Section 2(a), and therefore that the Commission has the authority to regulate cable television, at least to the extent that the regulation is "reasonably ancillary" to the regulation of broadcasting. 392 U.S. at 178. That case involved the carriage of broadcast signals by cable systems. In *U.S. v. Midwest Video Corp.*

[6] See also 47 U.S.C. §§151, 307(b).

(Midwest I) 406 U.S. 649 (1972), this Court approved the Commission's regulation of cable television beyond the signal carriage area. In upholding rules mandating local origination by cable systems over a certain size, this Court said that the Commission could regulate cable so as to "promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." 406 U.S. at 667. The Court noted that such objectives include the increasing of local outlets for self-expression and promoting programming diversity. *Id.* at 667-669.[7] And, of course, the courts have recognized that the Commission's duty to stimulate diversity is the "paramount" goal under the Communications Act. *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1970); *NAITPD v. FCC*, 502 F.2d 249 (2d Cir. 1974), and 516 F.2d 526 (2d Cir. 1975).

Applying the above test to the rules at issue in this case, it seems clear that the court below erred. The Commission quite specifically adopted those rules for reasons which included those approved in *Midwest I*. Thus, when the rules under review were adopted in 1976, amending the original 1972 rules, the Commission stated:

> First, we continue to believe that the public interest can be significantly advanced by the opening of cable channels for use by the public and other specified users who would otherwise not likely have access to television audiences. A commitment was made to the provision of these channels in the 1972 Rules which should not be abandoned. There is, we believe, a definite societal good in keeping open these channels of communication. While the overall impact that use of these channels can have may have been exaggerated in the past, nevertheless we believe they can, if properly used, *result*

[7] See *NBC v. United States*, 319 U.S. 190 (1943).

> *in the opening of new outlets for local expression, aid in the promotion of diversity in television programming*, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities. 59 FCC2d 294, 296 (emphasis added).

The access and channel capacity rules are thus clearly aimed at "increasing the number of outlets for local self-expression and augmenting the diversity of programs and types of services available to the public." *First Report and Order in Docket No. 18397*, 20 FCC2d 201, 202 (1969). This was conceded by the court below (App. A, p. 39 and n. 45); however, the court attempted to distinguish *Midwest I* by saying that there had to be a nexus between the cable regulations under review and the Commission's broadcasting industry duties. It said that the access rules have nothing to do with the retransmission of broadcast signals *(Southwestern)*, or with requiring cable systems to do what broadcasters do *(Midwest I)*. In the course of its analysis the court stated that it could not justify the invocation of otherwise valid objectives to impose regulations when the means used do not square with the statutory powers of the Commission. The court also characterized the access rules as common carrier regulation which, it said, the Commission cannot apply to broadcasters.

It is submitted that the court's rationale is plainly in error. The court would restrict the Commission's regulation of cable to that which is used in the broadcast area. However, this Court did not restrict the Commission in *Midwest I* from pursuing common statutory objectives for cable and broadcasting via different methods. All *Midwest I* required was that the regulation "*promote the objectives* for which the

Commission ha[s] been assigned jurisdiction over broadcasting." 406 U.S. at 667 (emphasis added). There can be no doubt that the objectives which the access rules are designed to promote are legitimately applicable to broadcasting as well.[8] The program origination requirement in *Midwest I* and the access regulations at issue here are both designed to stimulate the growth of cable televison as part of a national broadcast communications system in which television viewers will have available the broadest possible range of programming and other services. The availability of leased channels on a non-discriminatory basis creates the necessary marketplace environment for the growth and development of diverse program sources. The potential public benefit is immeasurable and the present program suppliers are only the first generation of entrepreneurs who stand ready to translate this potential into reality.

Furthermore, although we submit that it is not necessary to reach this question in order to uphold the Commission, it is not at all clear that the Commission cannot impose some form of access on broadcasters. In *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), which was an appeal from the Commission's refusal to mandate a limited right of access in broadcasting, this Court observed that "at some future date . . . the Commission . . . may devise some kind of limited right of access that is both practicable and desirable." *Id.* at 131.[9] See also 47 U.S.C. §315; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

---

[8] See *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (1978), where the Second Circuit upheld the Commission's preemption of state and local regulation of pay cable rates. Applying the test from *Midwest I* the court found that a "policy of permitting development free of price restraints at every level is reasonably ancillary to the objective of increasing program diversity . . .". *Id.* at 767."

[9] It should also be noted that, in the *CBS* opinion, this court took note of the then-pending cable access rules as a way of providing "increased oportunities for the discussion of public issues." 412 U.S. at 131.

Nor is *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.,) *cert. denied*, 434 U.S. 829 (1977), supportive of the opinion below. To the contrary, there the court struck down rules which sharply restricted the program content of pay cable on a series of independent grounds; and there the Commission's regulatory goal was the restriction of program diversity, not its enhancement as in the case under review. Here, the Commission's access rules are specifically designed to promote program diversity, a goal sanctioned by this Court in *Midwest I* and by the court in *HBO*.

On the jurisdictional question, the D.C. Circuit reviewed *Southwestern* and *Midwest I* and correctly stated the test for judicial review as follows:

> . . .we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act *or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television.* 567 F.2d at 28 (emphasis added).

The court then found that the Commission failed to make the required showing for its pay cable "anti-siphoning" rules because it had "not established its jurisdiction on the record evidence before it." 567 F.2d at 34. But the court also felt constrained to note the limits of its holding, saying:

> We do not hold that the Commission must find express statutory authority for its cable television regulations. Such a holding would be inconsistent with the nature of the FCC's organic Act and the flexibility needed to regulate a rapidly changing industry. However, we do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also ob-

> jectives for which the Commission could legitimately regulate the broadcast media. 567 F.2d at 34.

It is manifest that the jurisdictional test of *Midwest I* and *HBO* has been met in the case under review. Regulations designed to promote "the opening of new outlets for local expression [and] diversity in television programming" are certainly "objectives for which the Commission could legitimately regulate the broadcast media." Nowhere did the *HBO* court say that identical regulatory tools must be used to pursue these otherwise legitimate objectives. Furthermore, the *HBO* court stressed in support of its holding on the jurisdictional issue that the FCC's antisiphoning rules were not a reflection of a "well-understood and consistently held policy developed in the Commission's regulation of broadcast television." 567 F.2d at 28. The opposite is true here. Indeed, the Ninth Circuit has had occasion to face this question, albeit in the context of an allegation that the access rules do not go far enough. *American Civil Liberities Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975). That court held:

> The Commission's failure to impose common carrier obligations on access channels *and its imposition of the [1972 access rule]. . .are actions 'reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting.'* 523 F.2d at 1351 (emphasis added).

CONCLUSION

For the reasons set out above, MPAA urges this Court to reverse the decision of the Eighth Circuit and sustain the regulations of the Federal Communications Commission. The Commission's action falls well within the parameters of *Midwest I* and constitutes reasonable and necessary regulation in order to assure the open development of a new competitive marketplace for the suppliers of programming.

Respectfully submitted,

BARBARA SCOTT
JAMES BOURAS
FRITZ E. ATTAWAY
1600 Eye Street, N.W.
Washington, D.C. 20006
Attorneys for Amicus
Motion Picture Association
of America

Of Counsel:
ARTHUR SCHEINER
STUART F. FELDSTEIN
WILNER & SCHEINER
2021 L Street, N.W.
Washington, D.C. 20036

November 16, 1978